

**Country Pointe at Kings Park Homeowners Assn.
Inc. v Beechwood Kings Park Bldg. Corp.**

2011 NY Slip Op 33376(U)

December 12, 2011

Sup Ct, Suffolk County

Docket Number: 28808-2006

Judge: Emily Pines

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SHORT FORM ORDER

INDEX NUMBER: 28808-2006

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present: HON. EMILY PINES
J. S. C.

Original Motion Date: 06-28-2011
Motion Submit Date: 09-13-2011
Motion Sequence No.: 004 MOTD
005 MOTD

FINAL
 NON FINAL

_____ X
**COUNTRY POINTE AT KINGS PARK
HOMEOWNERS ASSOCIATION, INC.,
COUNTRY POINTE AT KINGS PARK
CONDOMINIUM I AND COUNTRY POINTE
AT KINGS PARK CONDOMINIUM II,**

Plaintiff,

-against-

**BEECHWOOD KINGS PARK BUILDING
CORP., MICHAEL DUBB, LESLIE A. LERNER
and CAROL BOSCO,**

Defendants.

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ORDERED that the Defendants' motion (motion sequence # 004) for partial summary judgment and the Plaintiffs' cross-motion (motion sequence # 005) are decided as set forth herein.

FACTUAL AND PROCEDURAL BACKGROUND

In 2006, Plaintiffs Country Pointe at Kings Park Homeowners Association, Inc., ("HOA"), Country Pointe at Kings Park Condominium I ("Condominium I") and Country Pointe at Kings Park Condominium II ("Condominium II")(collectively "Plaintiffs") commenced this action against the

defendants Beechwood Kings Park Building Corp. (“Beechwood”), Michael Dubb (“Dubb”), Leslie A. Lerner (“Lerner”) and Carol Bosco (“Bosco”) (collectively “Defendants”) for, among other things, breach of contract, breach of express and implied warranties, negligent construction, breach of fiduciary duty, and failure to pay assessments and common charges, in connection with the construction and sponsorship of a residential condominium development in Kings Park, New York. Plaintiffs subsequently discontinued the action as asserted against Bosco. The remaining Defendants now move for partial summary judgment dismissing the Plaintiffs first, second, third, fourth and eighth causes of action, and to strike the jury demand filed by the Plaintiffs. The Plaintiffs oppose Defendants’ motion and cross-move (1) for summary judgment on their fifth, sixth and seventh causes of action and (2) to add certain individuals as representative plaintiffs.

Beechwood, whose principals are Dubb and Lerner, was the sponsor and developer of the 137 home residential development and homeowners association known as Country Pointe at Kings Park, pursuant to two offering plans filed with the New York State Attorney General. Two separate condominiums, Condominium I and Condominium II, were created to own and control the common elements, buildings and the homes, other than the individually owned portions of the homes. Condominium I and Condominium II have separate offering plans and Boards of Managers. The HOA, comprised of members of both condominiums and managed by a Board of Directors, was organized to own, operate, manage and control certain community and recreational facilities, as well as to perform certain maintenance and repair functions in the development. Beechwood designated Dubb, Lerner, and Bosco to the HOA Board of Directors and the Boards of Managers of Condominiums I and II. Under the offering plan documents, the sponsor-appointed boards were to remain in control until 95% of the homes were conveyed to individual purchasers. Accordingly, the sponsor-appointed board members resigned from the respective boards, thereby surrendering control thereof, no later than September 2004. The sale of the final home occurred in April 2005.

In their Amended Complaint dated January 8, 2007, Plaintiffs allege, among other things, that Beechwood “failed and neglected to construct and complete the homes, common properties and common elements . . . in accordance with the offering plans and the documents and requirements contained therein” and “in conformance with the plans and specifications filed with the municipality in which plaintiffs are located” and “in conformance with the local building codes.” Plaintiffs further allege that the construction of the homes, common properties and common elements was performed with inferior, unsuitable and defective materials, that they were not constructed in a skillful manner free from material defects, and that Beechwood failed to obtain all necessary certificates of occupancy. Plaintiffs allege problems with drainage landscaping, fencing, irrigation, preserve, roadways, driveways, clubhouse, roofs, sidewalks, leaders and gutters. Based upon the foregoing, the first cause of action alleges that Beechwood breached its contractual obligation as set forth in the offering plans to complete the construction of the community substantially in accordance with the approved plans and specifications. The second cause of action alleges that Beechwood breached its express and implied warranties. The third cause of action alleges that Beechwood negligently constructed the homes, common properties, and common elements. The fourth cause of action alleges that Dubb and Lerner breached their fiduciary duty

to Plaintiffs, as members of the respective boards, by failing to investigate and ignoring the condition of the homes, common properties/elements. The fifth cause of action alleges that Beechwood failed to pay the HOA assessments relative to unsold homes in accordance with Article VI, Section 3 of the HOA's Declaration. The sixth cause of action alleges that Beechwood failed to pay Condominium I common charges totaling approximately \$750.00 relative to unsold homes, in accordance with Article VI of Condominium I's Declaration. The seventh cause of action alleges that Beechwood failed to pay Condominium II common charges totaling approximately \$1,900.00 relative to unsold homes, in accordance with Article VI of Condominium II's Declaration. The eighth cause of action alleges that Beechwood improperly collected a connection fee of \$350.00 from each purchaser of the 137 homes, thereby damaging Plaintiffs in the amount of \$47,950.00.

DISCUSSION

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85, 487 NYS2d 316 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Merely pointing to gaps in the opposing party's proof is insufficient (*Healy v. Damus*, 88 AD3d 848 [2d Dept. 2011]). Once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713, 641 NYS2d 701 [2nd Dept. 1996]). However, where a movant fails to meet its burden, the burden does not shift to the opposing party and the sufficiency of the opposition papers need not be considered (*Healy v. Damus*, *supra*).

Here, the Defendants contend that the only contracts at issue are the 137 purchase agreements between the original home purchasers and Beechwood. However, the Plaintiffs rely on provisions of the offering plans as imposing contractual obligations on Beechwood to complete construction substantially in accordance with the plans and specifications described in the offering plans. The first cause of action for breach of contract is premised upon Beechwood's alleged failure to comply with obligations imposed upon or undertaken under the terms of the offering plans.

An offering plan is a contract (*see 511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144 [2002]; *Green Harbour Homeowners' Assn., Inc. v. G.H. Dev. and Constr., Inc.*, 14 AD3d 963 [3rd Dept. 2005]). As noted by Justice Austin in *Hamlet on Olde Oyster Bay Home Owners Assoc., Inc. v. Holiday Org., Inc.* (12 Misc3d 1182(A), 2006 NY Slip Op 51378[U][2006], *12), *aff'd* 65 AD3d 1284 [2d Dept. 2009]):

The relationship and the legal obligations between the HOA and the owners of the . . . units is contractual. The obligations of the developer/sponsor to the HOA is established by the offering plan. The obligation of the sponsor/developer to the purchasers of the individual

units is established by the offering plan and the purchase agreements.

Thus, contrary to Defendants' contention, the Plaintiffs have standing to seek damages for breach of contract based upon the alleged breach of specific provisions of the offering plans as the offering plans are contracts establishing the obligations of Beechwood to the HOA.

Additionally, the Defendants contend that the first cause of action for breach of contract is barred by Beechwood's performance as demonstrated by the certificates of occupancy issued by the Town of Smithtown ("Town") for each of the homes and condominium buildings, as well as the guard house and clubhouse. Defendants contend that the certificates of occupancy certify that Beechwood completed construction in accordance with the plans filed with the Town, the building code, and Town requirements. Even assuming that Defendants are correct on this issue, the Amended Complaint alleges that the Defendants failed to comply with their contractual obligations with respect to the construction of more than just the buildings for which certificates of occupancy were issued. Paragraph "TWENTY-SECOND" of the Amended Complaint alleges that the Defendants failed to complete construction of, and that there problems with, drainage, landscaping, fencing, irrigation, preserve, roadways, driveways, clubhouse, roofs, sidewalks, leaders and gutters. Thus, Plaintiffs' breach of contract claim encompasses more than just the homes, condominium buildings, guardhouse and clubhouse. The Defendants have not made a sufficient evidentiary showing to demonstrate the absence of any material issues of fact as to whether construction of all of these items was completed in accordance with Defendants' contractual obligations. The Affidavit of Carol Bosco submitted in support of the Defendants' motion is insufficient as it fails to address most of the items on which Plaintiff base their breach of contract claim. Because the Defendants have failed to meet their burden as the party moving for summary judgment, the burden does not shift to the Plaintiffs and the sufficiency of the opposition papers need not be considered (*Healy v. Damus*, supra). Accordingly, Defendants' motion with regard to the first cause of action is denied.

With regard to the second cause of action alleging breach of express and implied warranties, the applicable warranty provision as set forth in the offering plans provides:

Regarding the Common Elements the Sponsor will correct any defects in the construction of the Common Elements, or in the installation or operation of any mechanical equipment therein, due to improper workmanship or material substantially at variance with this Offering Plan provided and on condition that Sponsor is notified of or becomes aware of such defect(s) within twelve (12) months from the date of substantial completion of the defective portion(s) of the Common Elements.

In support of that branch of their motion seeking dismissal of the second cause of action, Defendants' contend that several warranty claims were received by Beechwood, most of which were resolved to the full satisfaction of the claimant. Additionally, Beechwood represents that there are no timely and outstanding notice of warranty claims concerning legitimate defects. Finally, Beechwood

contends that the time to make warranty claims expired no later than August 18, 2005, 12 months after the last Condominium Common Element was substantially completed, and 13 months before this action was commenced. In opposition, the Plaintiffs argue that the second cause of action properly asserts a cause of action for breach of Beechwood's express warranty. Additionally, Plaintiffs confirm that the second cause of action only seeks recovery for breach of warranty with respect to Condominium Common Elements and HOA common areas. In reply, Defendants argue, for the first time, that there are no warranties covering HOA common areas, that the Condominium Plaintiffs have failed to comply with conditions precedent to statutory limited warranties governing the Condominium common elements, that the Condominiums failed to give notice of a warranty claim, a purported condition precedent to Beechwood's obligation to perform warranty work, and that there is no evidence establishing that any covered common element was not constructed in accordance with the standards set forth in the offering plans.

The Defendants have not demonstrated their prima facie entitlement to summary judgment on the second cause of action as they have not made an evidentiary showing supporting their argument that all of the warranty claims received by Birchwood were resolved to the satisfaction of the claimant or that they were otherwise properly rejected. Moreover, they have not demonstrated the untimeliness of any warranty claims currently being asserted by the Plaintiffs. The arguments raised by the Defendants for the first time in their reply papers on the motion have not been considered (*Lenox Hill Hosp. v. Government Employees Ins. Co.*, ___ AD3d ___, 932 NYS2d 705 [2d Dept. 2011]; *Goldman v. A & E Club Prop., LLC*, ___ AD3d ___, 932 NYS2d 136 [2d Dept. 2011]). In any event, the Defendants have not demonstrated that the Condominium Common Elements are covered under the Limited Warranty attached to the Rider to the Purchase Agreements. Accordingly, that branch of Defendants' motion seeking summary judgment dismissal of the second cause of action is denied.

That branch of the Defendants' motion which is to dismiss the third cause of action alleging negligence by Beechwood in the construction of the homes, common properties, and common elements, is granted as it is duplicative of the cause of action alleging breach of contract (*see Hamlet on Olde Oyster Bay Home Owners Assoc., Inc.*, supra at 1288).

With regard to the fourth cause of action, in order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct (*Kurtzman v. Bergstol*, 40 AD3d 588, 590 [2d Dept 2007]). Individual board members of condominiums owe a fiduciary duty to the condominium and its unit owners (*Board of Mgrs. of Fairways at North Hills Condominium v. Fairway at North Hills*, 193 AD2d 322 [2d Dept. 1993]).

Defendants argue, among other things, that the Plaintiffs have failed to produce evidence, in admissible form, of a breach of a fiduciary duty by Dubb and Lerner. However, as stated above, as the moving party the Defendants have the initial burden of making a prima facie showing of entitlement to

judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, supra; *Zuckerman v. City of New York*, 49 NY2d 557, supra). Merely pointing to gaps in the opposing party's proof is insufficient (*Healy v. Damus*, supra). Thus, on this motion it is the Defendants' burden to make an evidentiary showing that Dubb and Lerner did not engage in misconduct by, as alleged by Plaintiffs, failing to investigate and ignoring the condition of the homes, common properties/elements, or that they had no duty to do so. The Defendants have not met their burden. Notably, the Defendants have not submitted affidavits from either Dubb or Lerner detailing their knowledge, if any, of the alleged construction defects and what actions, if any, they took as board members with respect thereto. Although Defendants submit an affidavit from Carol Bosco in which she states, among other things, that the Condominium and HOA boards had no authority to take any legal action against Beechwood during the period of Beechwood control, this does not establish that Dubb and Lerner, as board members, did not have an obligation to investigate problems with construction and take corrective action, if warranted. Moreover, Bosco's affidavit is based upon her personal knowledge, and does not constitute evidence of the knowledge of Dubb and Lerner. Although Defendants' have submitted Dubb's deposition testimony in support of the motion, they do not refer to any specific testimony about alleged construction defects. Because the Defendants have not made a sufficient evidentiary showing on this motion regarding the actions, if any, taken by Dubb and Lerner, as board members, with regard to problems with construction, the business judgment rule, "which bars 'judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes'" (*North Fork Preserve v. Kaplan*, 68 AD3d 732, 733 [2d Dept. 2009] quoting *Auerbach v. Bennett*, 47 NY2d 619, 629 [1979]), cannot be applied at this stage of the action. Moreover, contrary to the Defendants' contention, the Martin Act does not bar Plaintiffs' breach of fiduciary duty claim as it is not predicated on alleged material omissions from the offering plan amendments mandated by the Martin Act (General Business Law Art. 23-A) and the Attorney General's implementing regulations (*see Kerusa Co., LLC v. W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236 [2009]). Accordingly, that branch of Defendants' motion for summary judgment seeking dismissal of the fourth cause of action for breach of fiduciary duty is denied.

With regard to the eighth cause of action alleging that Beechwood improperly collected a connection fee of \$350.00 from each purchaser of the 137 homes, thereby damaging Plaintiffs in the amount of \$47,950.00, the Defendants contend that this claim is frivolous as both offering plans and the individual contracts of sale specifically advised purchasers that the water connection service fee would actually be \$750.00. Thus, Defendants argue that Plaintiffs cannot be heard to complain that the water connection service fee charged was \$400.00 less than what was stated in the offering plans and purchase contracts. Although the Plaintiffs concede that the offering plans disclose a water service connection fee of \$750.00, they argue "that a question of fact exists as to the amount of the Sponsor's actual water connection fee and the circumstances surrounding the reduction of the fee as published in the Offering Plan." Based upon the foregoing, it is clear that the offering plans and individual contracts advised purchasers that a water connection service fee would be charged. In opposition to Defendants' prima facie showing of entitlement to summary judgment on this cause of action, the Plaintiffs have failed

demonstrate that the fact that the fee actually charged was less than what was disclosed provides a basis for Plaintiffs to recover damages. Accordingly, that branch of Defendants' motion seeking summary judgment dismissing the eighth cause of action is granted.

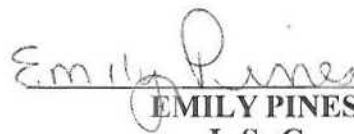
That branch of Defendants' motion seeking to strike the jury demand filed by the Plaintiffs is denied. Contrary to the Defendants' contention, as discussed above, the Plaintiffs' claims are not predicated on the sales contracts between Beechwood and the individual purchasers. Therefore, the jury waiver provision in those agreements is not applicable here.

With regard to the Plaintiffs' cross-motion for summary judgment on the fifth, sixth and seventh causes of action seeking damages for Beechwood's failure to pay HOA assessments and Condominium common charges, the Plaintiffs have made a prima facie showing, and the Defendants do not dispute, that Beechwood had an obligation to pay such charges. However, a prima facie showing of entitlement to judgment as to the amounts, if any, of unpaid charges has not been made by Plaintiffs. Accordingly, those branches of Plaintiffs' cross-motion seeking summary judgment on the fifth, sixth and seventh causes of action is denied.

Finally, that branch of Plaintiffs' cross-motion seeking leave to serve a second amended complaint adding Joseph Fischer and Joseph Connors as plaintiff representatives of Condominium II, and William Lau and Louis Bruno as plaintiff representatives of Condominium I, is granted, without opposition.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: December 12, 2011
Riverhead, New York



EMILY PINES
J. S. C.

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